U.S. Department of Justice

Environment and Natural Resources Division

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BSG:AML
DJ No. 90-11-3-1620/2

September 16, 2002

VIA EMAIL, TELECOPY, AND REGULAR MAIL

CONFIDENTIAL SETTLEMENT COMMUNICATIONS

Jonathon Conte, Esq.
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Re: United States v. Aeronca, Inc. et al.
Civil Action No. 1:01 CV 00439
Response to September 10, 2002 Settlement Offer

Dear Jonathon:

This letter responds to your letter of September 10, 2002, in which you set forth a new settlement offer on behalf of your clients, Clarke Incinerators, Inc., Clarke Container, Inc., and Martin Clarke (collectively "CII"). The United States appreciates the good faith nature of the new offer and the accompanying analysis that provides thoughtful arguments in support of the new offer. While the United States does not concur with many points in CII's analysis, CII's analysis nonetheless leads the United States to conclude that we need to make a downward adjustment of our August 29, 2002 settlement demand.

Pre-1967 Solid Waste Disposals at Skinner

We disagree with CII's apparently strongly-held view that Thomas Clarke did not send hazardous substances to the Skinner Site prior to 1967. The evidence – which CII dismisses too casually in the second phase of CII's analysis – is clear that Thomas Clarke arranged for the disposal of cyanide ash to the Site in at least 1964. While, in this "first" part of the analysis, we are dealing with "solid" waste, and not "liquid" waste, the fact that Thomas Clarke arranged for the disposal of cyanide ash makes it clear to the United States that, despite the views of CII, Thomas Clarke clearly engaged in the hauling and disposal of many types of waste, including waste that contained hazardous substances. As your letter points out, Thomas Clarke was burdened with enormous debt in the 1960s. It is not credible to believe that he cautiously guarded against the transportation of wastes containing hazardous substances. Indeed, the Ford purchase order and Thomas Clarke's affidavit affirmatively refute such a claim.

Additionally, Mrs. Skinner was unequivocal in her testimony. She indicated that the Skinner Log entries involving Thomas Clarke involved disposal, not purchases. There is evidence that everyone who had a pick-up truck disposed of waste at Skinners as a result of cleaning up the waste from the fire at the Sharonville army depot. While testimony has not yet been developed to demonstrate that that fire was the source of Thomas Clarke's disposal at the Skinner Site, it is a possibility.

The United States, however, generally concurs with CII's view that we have limited information regarding the contents of the pre-1967 solid waste disposals of Thomas Clarke. Of course, in litigation, the United States will not have to prove the contents of the pre-1967 disposals; we need only one disposal of hazardous substances and CII will be liable for all of our costs. Moreover, the settlement negotiations that we currently are engaged in have as their premise an apportionment of liability based on volumetric contribution. Numerous PRPs that previously have settled with the United States and the private plaintiffs had arguments at least as compelling as CII's regarding the lack of evidence about the specific contents of the wastes they disposed of at the Skinner Site, but nevertheless settled. With that in mind, we believe that allocating 1430 cubic yards to Thomas Clarke in the pre-1967 period was conservative (i.e., $717 at $.50 per cubic yard). Allocating 715 cubic yards to CII was fair and appropriate. In the spirit of some compromise, however, we reduce our demand on this portion of the analysis to $13,800 (approximately 80% of our previous $17,255 demand).

Pre-1967 Shipments of Cyanide Ash

CII's arguments regarding the cyanide ash largely turn on evidentiary admissibility issues. We disagree with CII's analysis regarding the admissibility of the affidavit of Thomas Clarke and the Ralph Dent memo. While these documents constitute hearsay, we are confident that the Court will admit them into evidence under well-established exceptions to the hearsay rule.

Thomas Clarke's affidavit is admissible under Rule 804(b)(3) as a statement against interest. By letter dated June 26, 1964, the Butler County Board of Health ("BCBOH") advised Thomas Clarke that disposing of industrial waste at the Skinner landfill violated BCBOH regulations because such disposal could not be done without the consent of the BCBOH. Nevertheless, in Thomas Clarke's affidavit dated September 14, 1964, Thomas Clarke admitted disposing of Ford's industrial and cyanide waste at the Skinner Landfill at a time when Thomas Clarke did not have a permit. Such an admission was contrary to Thomas Clarke's pecuniary interests because it may have jeopardized Thomas Clarke's ability to continue to run a disposal business and it may have exposed Thomas Clarke to pecuniary penalties for violating BCBOH regulations.

The United States agrees that Ford was one of Thomas Clarke's regular customers in 1964, and that, because of Thomas Clarke's heavy indebtedness, Thomas Clarke had a significant incentive to retain Ford as a customer. Contrary to CII's assertion, however, the United States does not believe that that fact leads to the conclusion that Thomas Clarke lied to Ford about the

destination of Clarke's disposal of Ford's "cyanide chemicals." Thomas Clarke had no reason to lie to Ford about the location of the disposal. Indeed, if Thomas Clarke had wanted to lie, he would have told Ford that the chemicals were disposed of at Clarke's Sanitary Fill. Clarke's Sanitary Fill was not under the intense scrutiny that Skinner's was at the time of Thomas Clarke's affidavit. Thomas Clarke could have deflected significant adverse community pressure away from Ford if Thomas Clarke had said that the cyanide chemicals did not go to Skinner's. Thus, while the United States agrees that Thomas Clarke's relationship with Ford was very important to Thomas Clarke, we believe that that fact makes it more – not less – likely that Thomas Clarke was being truthful in his affidavit.

Even if Thomas Clarke's affidavit is not admissible under Rule 803(b)(3), it is admissible under the "residual" hearsay exception in Rule 807. Rule 807 applies to statements not specifically covered by Rule 803 of 804. In this case, Thomas Clarke's affidavit has "equivalent circumstantial guarantees of trustworthiness" to support admission under Rule 807. Thomas Clarke's statement is corroborated by other evidence. Numerous documents in this case indicate that cyanide waste from Ford was sent to Skinner through Thomas Clarke; Thomas Clarke's affidavit is not the only source of this information. Thomas Clarke made his affidavit under oath. For the reasons set forth in the preceding paragraph, Thomas Clarke had an incentive to tell the truth to Ford, even though it exposed him to some risk with the BCBOH. Finally, there is nothing inconsistent or incredible about the statement.

Mr. Dent's memo is admissible under either the business records exception to the hearsay rule or Rule 807. Mr. Dent himself indicated that he was "certain" that his memo accurately reflected exactly what had happened with respect to the cyanide waste. Mr. Dent indicated that neither he nor Mr. Oliver had any motive to lie; quite the contrary, they had every reason to state the truth.

Thus, we are confident that a Court would admit both Thomas Clarke's affidavit and Mr. Dent's memo into evidence.

In addition, the United States disagrees with CII's views on what we need to prove in order to establish that the waste contained cyanide. Under CII's views, the United States almost never would succeed in proving a CERCLA case. Many of our cases involve disposals that occurred more than fifty years ago. Fortunately, the law does not require the United States to have more evidence than the documentary evidence that we have in this case (indeed, we can have less and still succeed). As you are aware, the law in this regard (as in most regards with respect to CERCLA) is extremely favorable to the United States.

With respect to allocation, however, and having further thought about this issue and the fact that we are trying to undertake this settlement based on volume, the United States can agree to reduce its demand here. Unlike CII, however, we do not think that it is credible to believe that Thomas Clarke arranged for the disposal of only one five drum shipment of cyanide ash. Thomas Clarke clearly had other drums containing substances at his business. The Dent memo

indicated that Thomas Clarke loaded four additional drums onto the Ford truck. While we do not know the contents of these drums, they provide strong evidence that Thomas Clarke received waste shipped in drums. Such waste has a high likelihood of containing hazardous substances.

Given Thomas Clarke's affidavit, and the United States' view that Thomas Clarke had no motive to lie in this affidavit, we believe that the six year duration for Thomas Clarke's receipt of Ford's cyanide ash is supported by the evidence. However, we will compromise down to five 55-gallon drums per year, thus making the total gallons 1650. CII's share is 825 which corresponds to approximately $52,600.

1986 and 1987 Disposal

The United States continues to believe that the Skinner Log is incomplete. As just one example, the Skinner Log contains NO entries in 1988 for Dick Clarke, and yet, we have invoices and canceled checks reflecting that Dick Clarke transported over 100 loads to Skinner in 1988 and made several thousand dollars in payments. Thus, it is clear that the Skinner Log is incomplete.

In addition, the United States generally is aware of the allocator's findings. The United States' original allocation to CII of 12,192 cubic yards in the 1986-1987 time frame probably is 50% below what the allocator found. Mr. Barkett is a professional at allocation, and thus, it is customary for us to give him some deference.

Moreover, using several different methods (as I described on the telephone on August 29, 2002), I determined that CII's disposal at Skinner of 12,192 cubic yards – reflecting approximately 522 loads – was *consistent* with a reasonable estimation of the percentage of total loads that CII would have hauled in the 1986 and 1987 time frame.[1]

Nevertheless, the United States concedes that numerous witnesses that we have deposed have not identified Marty Clarke as a major C & D disposer at the Site. Moreover, we agree that Mr. Blevins was employed as a roll-off driver for, at most, four months. These aspects of the evidence with respect to CII's volumetric contribution give us pause.

We continue to maintain that the disputed "$2,000" entry in the Skinner Log rightfully is charged to CII. Other pages in the Log demonstrate that Mrs. Skinner sometimes made somewhat confusing entries. (See, e.g., page 000085.) Given that fact, a trier of fact must evaluate all of the available evidence to determine the best possible inference. In this case, it is clear by the spacing on page 000086 that the $2,000 entry does not belong to King Wrecking or Mid-American -- the two closest entries to CII on the page. It is more likely that one of the three

[1] And, in one of my analyses, I specifically adopted an approach that reflected the seasonal variability of the C&D roll-off business.

amounts we attribute to CII was for the last quarter in 1986 or that the three amounts were for two month increments. Thus, we will stick to our view that the Skinner Log reflects payments of $11,298 from CII to Skinner.

With respect to the question of the charges for 30 cubic yard boxes, the United States has gone back and reviewed more documentary evidence from other disposers. Unfortunately for CII, we have found clear evidence that Mrs. Skinner started to charge different rates for different size roll-offs in 1988. Prior to 1988, Mrs. Skinner charged a flat rate of $30 per load. Such a fact would be consistent with the view that the Skinners charged less than other landfills. Given that fact, we are not inclined to subscribe to CII's view -- unsupported by documentary evidence -- that Mrs. Skinner charged $40 for a 30 cubic yard box. Indeed, such an amount would be affirmatively inconsistent with many documents that we have that establish that, starting in March of 1988, Mrs. Skinner charged $30 for 20 yard boxes; $35 for 30 yard boxes; and $40 for 40 yard boxes.

If we again assume that CII sent two times as many 20 yard boxes as 30 yard boxes and if we correct for the error that we had previously made in the rate for 30 yard boxes, we come to the following conclusion:

$11,298 divided by $30 per load = 376 loads
$x + 2x = 376$
$x = 125$
$(125 \times 30) + (250 \times 20) = 8870$ cu. yards.

Thus, under this scenario, CII sent 8,870 cubic yards to Skinner, not 8,128, as we talked about in our telephone conversation of August 29, 2002.

However, despite the fact that we know the Skinner Log is incomplete, we are prepared to use no "multiplier" for this 8,870 cubic yard amount. Thus, we seek $214,000, not $294,229, for the period 1986-1987.

Ability to Pay

Last year, DOJ's financial analyst reviewed CII's financial records. Without specifically describing the analyst's findings, it is sufficient to state that the analyst concluded that CII could afford the amount represented by the offer in this letter. For a small business, CII has a very good cash flow and low expenses. While the United States is willing to allow CII to make installment payments, we do not have any justification for lowering the actual demand based on ability to pay considerations.

Summary

I am prepared to recommend to the appropriate officials in EPA and DOJ a settlement along the following lines. The total settlement amount would be 280,000, payable in eight quarterly installments of $35,000, but each installment payment (after the first payment) would include interest at the then-current Superfund interest rate on the total principal balance then due. Also, because of Martin Clarke's divorce situation and that fact that he is being pressured to sell CII, Martin Clarke's joint and several liability for the payments would be necessary. Of course, Martin Clarke, in turn, would receive a liability release. The settlement would have to be embodied in a Consent Decree that includes terms and conditions of the sort that the United States filed earlier in this action when we settled with Acme Wrecking, Sealy, and Hirschberg.

With respect to the payment schedule, we prefer two years rather than three years. First, we obviously prefer no payment schedule at all, but we are willing to accommodate CII and Martin Clarke on this. Second, the financial statements that we reviewed indicated that two years should be more than enough time to pay the debt. Third, Martin Clarke's transitional personal situation makes us interested in keeping the payment schedule shorter rather than longer.

With respect to interest, we have no discretion not to charge interest when we extend payments over time. Likewise, the Superfund interest rate is the minimum rate we must charge. The Department of Treasury changes the Superfund interest rate on October 1 of each year. It is generally what most people consider to be a modest interest rate. The current rate is 3.35%. I expect that that rate will increase on October 1, 2002. Information regarding the Superfund interest rate can be found at www.epa.gov/budget/finstatement/superfund/int_rate.htm.

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Thank you for considering this counterproposal. In the interest of trying to determine as quickly as possible if we can reach a settlement, the United States has made a significant downward adjustment from its August 29, 2002. We hope to hear from you soon, and hopefully by no later than September 20, 2002.

Sincerely,

Annette M. Lang
Trial Attorney

cc: Michael O'Callaghan